Perwira Habib Bank Malaysia Bhd v Viswanathan s/o Ramakrishnan

HIGH COURT (IPOH) — ORIGINATING SUMMONS NO 24-817-1992
KANG HWEE GEE J
1 FEBRUARY 1996

Agency *— Authority of agent — Land charged by virtue of power of attorney — Scope of authority of agent*

Land Law *— Charge — Order for sale — Application for — Charge executed by holder of power of attorney who had exceeded his power — Whether there exists cause to the contrary — National Land Code 1965 s 256(3)*

The defendant entered into a joint venture agreement with one Lee & Cheong Sdn Bhd to develop two pieces of land belonging to the defendant into a housing estate. Pursuant to the agreement, the defendant granted a power of attorney to one Robert Cheong, a director of Lee & Cheong Sdn Bhd, to charge the land for its benefit in order to carry out the joint venture housing development. By using this power of attorney, Robert Cheong charged the defendant's land to the plaintiff bank to secure a loan for the benefit of Teng Kong Enterprise Sdn Bhd, a sister company of Lee & Cheong Sdn Bhd. This was contrary to the power of attorney. The issue for consideration was whether Robert Cheong had acted in excess of his authority conferred by the power of attorney and if the answer was in affirmative, whether this was sufficient to resist the plaintiff's application for an order for sale.

Held, dismissing the application with costs:

(1) Based on the letters of the power of attorney and the agreement annexed to the charge, the holder of the power of attorney, Robert Cheong, had exceeded his authority by charging the defendant's lands to the plaintiff for the benefit of Teng Kong. This was contrary to the specific power granted to him under cl 6 of the power of attorney (see p 481F–G).

(2) The fact that Teng Kong Enterprise Sdn Bhd was a sister company of Lee & Cheong Sdn Bhd, that Robert Cheong was a director of both, and that Teng Kong Enterprise Sdn Bhd was in fact a company undertaking the development of the housing scheme would not have absolved the plaintiff from the consequence of having taken a charge from an agent of the defendant without the defendant's authority as in law the companies were entirely two different persons (see p 481H).

(3) Although it was a principle of agency law that the holder of a power of attorney who acted in excess of and outside the reasonable scope of his special power would not make the donor liable to a third party, the decision whether or not to allow the plaintiff's application for sale could not be grounded on agency law alone but on the broader investigation under s 256(3) of the National Land Code 1965 whether there was cause to the contrary

so as not to grant the order of sale which the court must undertake as the plaintiff had acquired an indefeasible interest in the land as a registered chargee (see pp 481I–482A).

(4) On the facts of the case, there was in existence cause to the contrary that the order for sale applied for by the plaintiff should not be made. This was because the agent had acted in excess of his authority in charging the land to the plaintiff and it would be a travesty of justice to ignore the established agency law that a person would not be liable for the act of his agent who acts in excess of his authority in favour of the indefeasibility which the plaintiff acquired (see p 483B–C); *Magnum Finance Bhd v Ling Sing Ping* [1988] 2 MLJ 403 followed.

Obiter:

A registered charge obtained from an agent of the defendant who had acted in excess of the authority granted to him under a power of attorney as in the present case would constitute a charge that was obtained by means of an insufficient instrument within the meaning of s 340(2)(b) of the National Land Code 1965 which would operate to deny the plaintiff his indefeasibility (see p 484A).

[Bahasa Malaysia summary

Defendan telah mengikat suatu perjanjian usaha sama dengan sebuah syarikat bernama Lee & Cheong Sdn Bhd untuk memajukan dua bidang tanah kepunyaan defendan kepada satu kawasan perumahan. Menurut perjanjian tersebut, defendan telah memberikan satu surat wakil kuasa kepada seorang bernama Robert Cheong, seorang pengarah Lee & Cheong Sdn Bhd, untuk menggadai tanah tersebut untuk manfaat syarikat itu supaya ianya dapat melaksanakan usaha sama pemajuan projek perumahan itu. Dengan menggunakan surat kuasa wakil ini, Robert Cheong telah menggadaikan tanah tersebut kepada plaintif untuk mendapatkan satu pinjaman bagi manfaat Teng Kong Enterprise Sdn Bhd, sebuah syarikat bersekutu Lee & Cheong Sdn Bhd. Ini adalah bertentangan dengan surat kuasa wakil itu. Isu untuk dipertimbangkan adalah sama ada Robert Cheong telah bertindak melebihi kuasanya yang dikurniakan oleh surat kuasa wakil tersebut dan sekiranya jawapannya adalah positif, sama ada ini adalah mencukupi untuk menolak permohonan plaintif untuk satu perintah jualan.

Diputuskan, menolak permohonan dengan kos:

(1) Berdasarkan surat kuasa wakil dan perjanjian yang dilampirkan kepada gadaian tersebut, pemegang surat kuasa wakil, iaitu Robert Cheong, telah melebihi kuasa dengan menggadaikan tanah defendan kepada plaintif untuk manfaat Teng Kong. Ini adalah bertentangan dengan kuasa tertentu yang diberikan kepadanya di bawah fasal 6 surat kuasa wakil itu (lihat ms 481F–G).

(2) Hakikat bahawa Teng Kong Enterprise Sdn Bhd adalah syarikat bersekutu dengan Lee & Cheong Sdn Bhd, bahawa Robert

Cheong adalah pengarah bagi kedua-duanya dan bahawa Teng Kong Enterprise Sdn Bhd adalah sebenarnya syarikat yang menjalankan pemajuan skim perumahan itu, tidak dapat membebaskan plaintif daripada akibat menerima gadaian dari ejen defendan tanpa kuasa defendan, kerana di sisi undang-undang syarikat-syarikat tersebut adalah dua entiti yang berlainan (lihat ms 481H).

(3) Walaupun ianya adalah prinsip undang-undang ejensi bahawa pemegang surat kuasa wakil yang bertindak melebihi dan di luar linkungan munasabah kuasa istimewanya tidak akan menyebabkan pemberi kuasa bertanggungjawab kepada pihak ketiga, keputusan sama ada untuk membenarkan permohonan plaintif untuk perintah jualan tidak boleh berasaskan undang-undang ejensi sahaja tetapi pada siasatan yang lebih luas di bawah s 256(3) Kanun Tanah Negara 1965 sama ada terdapat kausa bertentangan untuk tidak memberikan perintah jualan yang harus dijalankan oleh mahkamah memandangkan yang plaintif telah memperolehi kepentingan tak boleh sangkal dalam tanah tersebut sebagai pemegang gadaian yang berdaftar (lihat ms 481I–482A).

(4) Berdasarkan fakta-fakta kes, terdapat kausa bertentangan bahawa perintah jualan yang dipohon oleh plaintif tidak harus dibuat. Ini adalah kerana ejen telah bertindak di luar kuasanya dengan menggadaikan tanah kepada plaintif dan ianya akan menjadi ejekan keadilan untuk mengabaikan undang-undang ejensi yang mantap bahawa seseorang tidak akan menanggung tindakan ejennya yang bertindak melebihi kuasanya dan memihak kepada kepentingan tak boleh sangkal yang diperolehi oleh plaintif (lihat ms 483B–C); *Magnum Finance Bhd v Ling Sing Ping* [1988] 2 MLJ 403 diikut.

Obiter:

Satu gadaian yang berdaftar yang diperolehi dari seorang ejen bagi pihak defendan yang telah bertindak melebihi kuasa yang diberi kepadanya di bawah surat kuasa wakil seperti di dalam kes ini akan menjadi satu gadaian yang diperolehi melalui instrumen yang tidak lengkap dalam ertikata s 340(2)(b) Kanun Tanah Negara 1965 yang akan beroperasi untuk menafikan ketakbolehsangkalan plaintif (lihat ms 484A).]

Notes

For a case on the scope of authority of an agent, see 3 *Mallal's Digest* (4th Ed, 1994 Reissue) para 1136.

For cases on cause to the contrary in an application for an order for sale, see 8 *Mallal's Digest* (4th Ed, 1996 Reissue) paras 1495–1500.

Cases referred to

Associated Finance Corp Ltd v Poomani [1972] 1 MLJ 117 (refd)

Bryant Powi & Bryant Ltd v La Banque du Peuple [1893] AC 170 (refd)

Danby v Courts & Co (1885) 29 Ch D 500 (refd)
Jacobs v Morris [1902] 1 Ch 816 (refd)
Keng Soon Finance Bhd v MK Retnam Holdings Sdn Bhd & Anor [1989] 1 MLJ 457 (refd)
Magnum Finance Bhd v Ling Sing Ping [1988] 2 MLJ 403 (folld)
Murugappa Chettiar v Letchumanan Chettiar [1939] MLJ 296 (refd)
Public Finance Bhd v Narayanasamy [1971] 2 MLJ 32 (refd)
Subramania Pillay v Sundarammal [1968] 2 MLJ 115 (refd)

Legislation referred to

Land Code (FMS Cap 138)
National Land Code 1965 ss 253, 256(3), 257, 340
Moneylenders' Ordinance 1951

Lau May Ling (*Shook Lin & Bok*) for the plaintiff.
Mohd Asri bin Abas (*Concisom & Co*) for the defendant.

Kang Hwee Gee J: In this originating summons, the plaintiff chargee is seeking an order for sale under ss 256 and 257 of the National Land Code 1965 ('the NLC 1965') to satisfy an outstanding term loan of RM1,373,036.89 with interest due to the plaintiff on the following nine lots of land:

(1) HS (D) LP 106/84, PT No 2670;
(2) HS (D) LP 108/84, PT No 2672;
(3) HS (D) LP 118/84, PT No 2682;
(4) HS (D) LP 127/84, PT No 2691;
(5) HS (D) LP 177/84, PT No 2741;
(6) HS (D) LP 188/84, PT No 2752;
(7) HS (D) LP 203/84, PT No 2767;
(8) HS (D) LP 212/84, PT No 2776; and
(9) HS (D) LP 159/84, PT No 2723.

The sale was sought to satisfy an the outstanding term loan pursuant to the terms and conditions in the agreement entered between the parties and annexed to the charge.

The lands were charged by one Robert Cheong Teng Kong ('Robert Cheong') purporting to act under a registered power of attorney granted to him by the defendant to secure a term loan of a sum not exceeding RM500,000 to Teng Kong Enterprise Sdn Bhd ('Teng Kong') (exh PHB1 in encl 2).

The defendant, in his affidavit in reply to the plaintiff's application (drafted in the fashion of a statement of defence), did not dispute that as at the date of the filing of this summons, the sum was outstanding in the term loan account of Teng Kong and that due statutory notice had been duly served but opposed the plaintiff's application essentially on two related grounds, viz that the lands were charged by Robert Cheong in excess of the power of attorney granted to him and that the plaintiff had,

by its servant or agent, colluded to disburse loans far in excess of the value of the lands charged.

In reply, Hong Lay Chuan, the plaintiff's manager, averred in his affidavit (encl 7) that Teng Kong, the company to which the plaintiff granted the RM500,000 loan, was in fact a sister company of Lee & Cheong Sdn Bhd and Robert Cheong was a director of both companies. At the time the charge was created, Teng Kong, which was in fact the company undertaking development of the lands, had completed over 20% of the housing development as evidenced by the three architect certificates exhibited as PHB7 in his affidavit. The defendant's allegation was that Robert Cheong had acted in excess of his authority in the power of attorney. The plaintiff, however, contended that this was not true as the loan was in fact granted for the benefit of Lee & Cheong Sdn Bhd.

At the hearing before me, counsel intimated that he was only proceeding with the ground that the charges were executed by Robert Cheong in breach and in excess of the power of attorney as averred in para 5 of the affidavit-in-reply of the defendant. He cited *Magnum Finance Bhd v Ling Sing Ping* [1988] 2 MLJ 403 as an authority, which he submitted was on all fours with the facts of the present case. The power of attorney in the present case, he submitted, was granted to Robert Cheong to enable him to carry out a joint venture housing development agreement which the defendant had entered into with a company called Lee & Cheong Sdn Bhd. Under cl 6 of the power of attorney, Robert Cheong was only authorized to charge the lands for the benefit of Lee & Cheong Sdn Bhd, but he had instead charged the lands for the benefit of another company, ie Teng Kong.

In order to appreciate the defendant's opposition to the plaintiff's application, it would be necessary for me to narrate in some detail the facts preceding the creation of the charge as disclosed in the affidavits of the parties.

On 23 March 1979, the defendant entered into a joint venture agreement (exh UR1 in the defendant's affidavit) with Lee & Cheong Sdn Bhd to develop two pieces of land belonging to the defendant (HS (D) LP 35/78 and HS (D) LP 36/78) into a housing estate. By cl 2(b) of the agreement, the defendant agreed to grant a power of attorney to Robert Cheong of Lee & Cheong Sdn Bhd. The clause reads as follows:

> 2(b) To enable the company to expedite the development of the said land, the beneficial owner hereby agrees to grant an irrevocable power of attorney to Robert Cheong Teng Kong of the aforesaid company to do all acts, deeds and things necessary and to execute, sign and endorse all such plans and forms as may be required by the company to effect subdivision of the said land and to obtain subdivisional titles thereof and to effect development thereon and to sign all plans for road and drains and for better performance by the company of their duties and obligations pursuant to this agreement to execute all whatever agreements so required for the development under this agreement.

In compliance with cl 2(b) of the agreement, the defendant executed a power of attorney (exh VR2) on 23 March 1979. Clause 6 of the power of attorney reads as follows:

> 6 Upon the company having commenced construction on the said land (upon the company having completed 20% of the housing development of the said land) as certified by the architect or designer for the time being of the company (which certificate shall not be disputed) to charge or mortgage (including deposit by way of equitable charge), the said land or the portions thereof as provided by cl 25 of the said agreement for the benefit of the company and subject to such covenants as my attorney may think fit.

On 14 June 1984, using the power of attorney, Robert Cheong charged the nine lots of the defendant's land (the subject matter of the present application which presumably were subdivisions from the original two titles mentioned in the joint venture agreement) to the plaintiff bank. The purpose of the charge was stated in the charge Form 16A in Bahasa Malaysia as:

> Bagi maksud menjamin — Di atas permintaan penggadai pemegang gadai membenarkan pinjaman terma (term loan) tidak lebih dari jumlah wang sebanyak RM500,000 kepada Teng Kong Enterprise Sdn Bhd yang beralamat di No 69-A, Jalan Leong Sin Nam, Ipoh, Perak.

Clause 1 of the agreement annexed to the charge, ie Form 16A confirmed the above purpose in the following terms:

> I, the abovenamed VISWANATHAN S/O RAMAKRISHNAN (KP No 1766333) of Kulumpang Railway Station, Kulumpang, Ulu Selangor ('the chargor(s)') DO HEREBY AGREE TO COVENANT AND UNDERTAKE with the abovenamed PERWIRA HABIB BANK MALAYSIA BHD ('the bank') as follows:
>
> 1 In consideration of the bank having agreed to lend to Teng Kong Enterprise Sdn Bhd of No 69-A, Jalan Leong Sin Nam, Ipoh, Perak ('the borrower') an amount of Ringgit Malaysia Five Hundred Thousand (RM500,000) only.
>
> The Chargor(s) undertake(s) that he will pay on demand to the bank:
>
> (1) the said sum of Ringgit Malaysia Five Hundred Thousand (RM500,000) Only ('the loan', which expression shall include wherever the context so permits any balance or part thereof) together with interest thereon at the rate of three per cent (3%) above base lending rate (the base lending rate is currently at 10.75% per annum per centum per annum ('the prescribed rate' which expression shall include where and when applicable such other rate as may from time to time be substituted therefor in the manner hereinafter provided), AND until demand as aforesaid to ensure that the borrower repay the loan and interest thereon at the prescribed rate by the instalments at the times and in the manner following that is to say ...

It could be readily appreciated that the power which was given to Robert Cheong was, by cl 6, restricted to charging the defendant's lands for the benefit of Lee & Cheong Sdn Bhd and only when the company had completed 20% of the housing development contracted under the joint venture agreement. It is also clear from the endorsement in the charge, Form 16A above and the annexure therein that the charge was executed as security for a loan of RM500,000 to a totally different company called Teng Kong.

Before proceeding to consider the plaintiff's application on the merits, it would be necessary for me first to set down in brief the law relating to power of attorney in so far as it is necessary for the disposal of this application.

A power of attorney is a deed by which a donor confers authority on the donee to act on behalf of the donor's behalf. In law, a person who holds a power of attorney is an agent of the person who grants him the instrument. Courts generally construe the document strictly according to well-recognized rules. To illustrate, I need only quote the oft-cited dictum of Lord Macnaghten in the Privy Council case (on appeal from Canada) of *Bryant Powis & Bryant Ltd v La Banque du Peuple* [1893] AC 170 at p 177 which was cited with approval by Suffian FJ in the Federal Court case of *Subramania Pillay v Sundarammal* [1968] 2 MLJ 115:

> ... Nor was it disputed that ... where an act purporting to be done under a power of attorney is challenged as being in excess of the authority conferred by the power, it is necessary to shew that on a fair construction of the whole instrument, the authority in question is to be found within the four corners of the instrument, either in express terms or by necessary implication.

Further, in construing the powers in a professionally-drafted instrument (such as in the present case), the rule to be applied is to regard the general object in the recitals as controlling the general terms in the operative part of the power of attorney (see *Danby v Courts & Co* (1885) 29 Ch D 500). Indeed, this principle of construction was applied in *Magnum Finance* cited by counsel for the defendant earlier which I will now consider.

In that case, the defendant's attorney, acting under the power of attorney granted to him by the defendant, charged the defendant's land to the plaintiff contrary to the purpose of a joint venture agreement the defendant had entered with the company of which the donee of the power was the managing director. Under cl 3 of the agreement, it was made clear that the power of attorney had been executed for the sole purpose of facilitating the operations of the agreement and under cl 21 of the power of attorney to charge the defendant's property was limited to the developer's lots which could only be ascertained after subdivision (which apparently had not yet been carried out at the time). Purporting to act under the (general) power granted to him under the power of attorney, the donee executed three charges on the defendant's land. The first and second charges were as securities for money owed by the developer to two other financial institutions. The third charge for a sum of RM1.4m was executed in favour of the plaintiff and out of which RM1m was used to redeem the donee's property together with the defendant's own property with Public Bank which was outside the powers granted to the donee.

It was held in *Magnum Finance Bhd v Ling Sing Ping* [1988] 2 MLJ 403 (per Siti Norma Yaakob J, as she then was) that the plaintiff owed a duty when the charge was created to at least inquire into the circumstances surrounding the execution of the power of attorney, the purpose of its execution and the limitations imposed on it by law. The court rejected the

plaintiff's argument that it owed no duty of care to inquire into the donee's authority which on the face of cl 6 of the power of attorney, expressly gave the power to charge the defendant's property. The court held that in construing a power of attorney, the general words giving the power need to be viewed against the objects of the power of attorney, which in that case were clearly spelt out in the recital limiting the donee's powers to the terms and conditions of the joint venture agreement. It was not open to the plaintiff to disclaim knowledge of the subsisting agreement between the developer and the defendant nor the legal construction of the power of attorney. The court refrained from making an order of sale of the charged land in favour of the plaintiff and stayed the foreclosure proceedings pending the determination of a civil suit which the defendant in that case had filed against the plaintiff arising out of the charge.

Having stated the law, I will now return to consider the plaintiff's case. I will begin with the interpretation of cl 6 of the power of attorney.

In my judgment, whether or not the development of the land had reached the percentage required under cl 6 of the power of attorney before the land could be charged by Robert Cheong, should not have been the concern of the plaintiff when it decided to take a charge on the defendant's lands. It is clear to me that in the context of the joint venture agreement, essentially that provision was not meant to constitute the power itself but to regulate the conduct of the parties to the joint venture. A third party in the position of the plaintiff should not therefore be made liable to investigate beforehand the stages of housing development before agreeing to take a charge on the lands as these are matters of internal management of the contracting parties to which the plaintiff was not privy.

However, there could be no dispute from the letters of the power of attorney and the agreement annexed to the charge that the holder of the power of attorney, ie Robert Cheong, had exceeded his authority by charging the defendant's lands to the plaintiff to secure a loan not for Lee & Cheong Sdn Bhd as authorized but for another company, Teng Kong, contrary to the specific power granted to him under cl 6 of the power of attorney. Unlike *Magnum*'s case, there was hardly any need for the plaintiff to look beyond the four corners of the power of attorney to discover the limit of Robert Cheong's authority. It is therefore not necessary to employ the principle of construction of power of attorney as enunciated in that case. The fact that Teng Kong was a sister company of Lee & Cheong Sdn Bhd, that Robert Cheong was a director of both and that Teng Kong was in fact the company undertaking the development of the housing scheme, would not have absolved the plaintiff from the consequence of having taken a charge from an agent of the defendant without the defendant's authority, as in law the companies were entirely two different persons.

Following the usual principle of agency law, the holder of a power of attorney who acts in excess of and outside the reasonable scope of his special powers will not make the donor liable to a third party (see *Jacobs v Morris* [1902] 1 Ch 816). This established principle alone will operate to protect the defendant against any normal contractual claim in respect of acts purportedly performed by his agent.

But agency law cannot be applied directly to deny the plaintiff his right which is contracted under the statutory provisions of the NLC 1965. This is so because a registered chargee acquires an indefeasible interest in the land under s 340(1) of the NLC 1965 and can enforce his charge by obtaining an order for sale under s 253(1) where there is a breach on the part of the chargor of the agreement relating to the charge. Under s 256(3), on such an application being made, the court shall order the sale of the land or lease to which the charge relates unless it is satisfied of the existence of 'cause to the contrary.' A decision whether or not to allow the plaintiff's application for sale therefore could not be grounded on agency law alone but on the broader investigation under s 256(3) whether there is cause to the contrary not to order sale which the court must undertake.

The exact scope of 'cause to the contrary' has not been defined anywhere in the the NLC 1965 but the phrase 'cause to be shown to the contrary' which was used in the equivalent provision of s 149 of the previous Federated Malay States Land Code (Cap 138) was construed by Aitken J in the pre-war case of *Murugappa Chettiar v Letchumanan Chettiar* [1939] MLJ 296 at p 298 as follows:

> ... Section 149 of the Land Code obviously contemplates that there may be cases in which charged land should not be sold, even though there has been a default in payment of the principal sum or interest thereon secured by the charge; and it seems to me that a chargor may 'shew cause' either in law or in equity against an application for an order for sale, and that the courts should refuse to make an order in every case where it would be unjust to do so. By 'unjust' I mean contrary to those rules of the common law and equity which are in force in the Federated Malay States.

Apart from *Magnum Finance*, the facts of which have been described earlier, other instances where the court 'is satisfied of the existence of cause to the contrary' to refuse an order of sale under s 256 of the NLC 1965 are not uncommon. Thus in *Public Finance Bhd v Narayanasamy* [1971] 2 MLJ 32, an order for sale under s 256 of the NLC 1965 was refused by the Federal Court on the ground that the appellant chargees had committed fraud by colluding with the respondent chargor to defeat the rights of purchasers who had purchased subdivided lots from the respondent before the charge had been created.

In *Associated Finance Corp Ltd v Poomani* [1972] 1 MLJ 117, a moneylender's application for sale of the land charged to them was refused on account of the infringement by the moneylender of several provisions of the Moneylenders' Ordinance 1951 which would render the loan agreement unenforceable.

The phrase was, however, given a more restricted interpretation in the Privy Council case of *Keng Soon Finance Bhd v MK Retnam Holdings Sdn Bhd & Anor* [1989] 1 MLJ 457 which can be found in the following passage at p 460 of the judgment:

> Granted that these words have been construed in Malaysia as justifying the withholding of an order where to make one would be contrary to some rule

> of law or equity, they clearly cannot extend to enabling the court to refuse relief simply because it feels sorry for the borrower or because it regards the lender as arrogant, boorish or unmannerly.

The case of *Magnum Finance* appears to be the closest authority that I can rely on to deny the plaintiff an order of sale on the ground that the charge of the defendant's lands was created by an agent who acted in excess of his authority under a power of attorney. In the present application, in deciding whether or not to grant an order for sale, I would have to direct my mind to the fact that courts have always construed the letter of deeds strictly. It would be a travesty of justice to ignore established agency law that a person would not be liable for the act of his agent who acts in excess of his authority in favour of the indefeasibility which the plaintiff acquires. I am satisfied that there is in existence in the present case a cause to the contrary that the order for sale applied for by the plaintiff should not be made, and accordingly I would refrain from making the order.

While on the subject, it may be appropriate at this stage for me to consider a related issue on indefeasibility mooted by Associate Prof and Deputy Dean, Faculty of Law, University of Malaya, Teo Keang Sood in his article 'Application for order for sale of land: Of conduct of chargees, the position of bona fide purchasers for value and illegality' [1989] 3 MLJ i, part of the contents of which I had relied on for the purpose of this judgment. Commenting on the cases in which the court had refused to grant an order for sale which I described earlier, he commented at p iii:

> It may be observed that in the cases noted above, the court in refusing the application for sale did not make reference to the relevant provisions in the NLC 1965 relating to indefeasibility which could have been used for the purpose of setting aside the charges in question. The exceptions to the indefeasibility provisions could have been relied upon by the court in *Associated Finance Corp Ltd v Poomani* [1972] 1 MLJ 117, to refuse the order for sale on the ground that as the loan agreement, pursuant to which the charge was created, was unenforceable at law, this in turn rendered the charge instrument void which had the effect of making the registered charge a defeasible one. In not making any reference to the indefeasibility provisions, the above two cases would appear to indicate that the circumstances in which an order for sale can be refused need not necessarily be confined to one of the statutory or recognized judicial exceptions to the indefeasibility provisions in the NLC 1965.

Counsel for the plaintiff in the present case, however, did not attempt to raise the status of indefeasibility which undoubtedly the plaintiff had acquired upon registration of the charge (which, until set aside under s 340(3), would remain in force) as a shield against the imperfection of its creation, but had counsel done so, then the antidote lies in s 340(2)(b) of the NLC 1965, which provides that:

> The title or interest of any such person or body shall not be indefeasible — where the registration was obtained by forgery, or by means of an insufficient or void instrument; ...

A registered charge obtained from an agent of the defendant who had acted in excess of the authority granted to him under a power of attorney as in the present case would, in my view, constitute a charge that is obtained by means of an insufficient instrument within the meaning of this provision which would operate to deny the plaintiff of his indefeasibility.

The plaintiff's application is dismissed with costs.

Application dismissed.

Reported by Ng Kian Pin